SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

02/22/2002

CLERK OF THE COURT
FORM V000A

HONORABLE MICHAEL D. JONES

P. M. Espinoza
Deputy

CV 2001-017643

FILED: _____

DESERT OASIS APARTMENTS

ANDREW M HULL

v.

ANGELA GONZALES

MICHAEL P FIFLIS

GLENDALE JUSTICE COURT
REMAND DESK CV-CCC

MINUTE ENTRY

This Court has jurisdiction of this appeal pursuant to the Arizona Constitution Article VI, Section 16, and A.R.S. Section 12-124(A). On January 24, 2002, this Court denied Appellee's Request for Oral Argument. This matter has been under advisement since that time. The Court has considered the record of the proceedings from the Glendale Justice Court, the exhibits made of record and the memoranda of counsel.

This is an appeal in a Special Detainer Action following the trial court's entry of judgment in favor of Appellant. Appellant appeals the trial judge's rent adjustment and denial of a contractual rental concession. Appellant contends that the "court's unilateral deduction of rent [was] improper and not supported by the evidence", and that it "[was] entitled to the rental concession." [1]

When reviewing the sufficiency of the evidence, an appellate court must no re-weigh the evidence to determine if it

[1] Plaintiff's [Appellant's] Opening Brief at page 4, lines 22-23.

would reach the same conclusion as the original trier of fact.[2] All evidence will be viewed in a light most favorable to sustaining a judgment and all reasonable inferences will be resolved against the Appellant.[3] If conflicts in evidence exists, the appellate court must resolve such conflicts in favor of sustaining the verdict and against the Appellant.[4] An appellate court shall afford great weight to the trial court's assessment of witnesses' credibility and should not reverse the trial court's weighing of evidence absent clear error.[5] When the sufficiency of evidence to support a judgment is questioned on appeal, an appellate court will examine the record only to determine whether substantial evidence exists to support the action of the lower court.[6] The Arizona Supreme Court has explained in *State v. Tison*[7] that "substantial evidence" means:

> More than a scintilla and is such proof as a reasonable mind would employ to support the conclusion reached. It is of a character which would convince an unprejudiced thinking mind of the truth of the fact to which the evidence is directed. If reasonable men may fairly differ as to whether certain evidence establishes a fact in issue, then such evidence must be considered as substantial.[8]

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[2] *State v. Guerra*, 161 Ariz. 289, 778 P.2d 1185 (1989); *State v. Mincey*, 141 Ariz. 425, 687 P.2d 1180, cert.denied, 469 U.S. 1040, 105 S.Ct. 521, 83 L.Ed.2d 409 (1984); *State v. Brown*, 125 Ariz. 160, 608 P.2d 299 (1980); *Hollis v. Industrial Commission*, 94 Ariz. 113, 382 P.2d 226 (1963).
[3] *State v. Guerra*, supra; *State v. Tison*, 129 Ariz. 546, 633 P.2d 355 (1981), cert.denied, 459 U.S. 882, 103 S.Ct. 180, 74 L.Ed.2d 147 (1982).
[4] *State v. Guerra*, supra; *State v. Girdler*, 138 Ariz. 482, 675 P.2d 1301 (1983), cert.denied, 467 U.S. 1244, 104 S.Ct. 3519, 82 L.Ed. 2d 826 (1984).
[5] *In re: Estate of Shumway*, 197 Ariz. 57, 3 P.3rd 977, review granted in part, opinion vacated in part 9 P.3rd 1062; *Ryder v. Leach*, 3 Ariz. 129, 77P.490 (1889).
[6] *Hutcherson v. City of Phoenix*, 192 Ariz. 51, 961 P.2d 449 (1998); *State v. Guerra*, supra; *State ex.rel. Herman v. Schaffer*, 110 Ariz. 91, 515 P.2d 593 (1973).
[7] SUPRA.
[8] Id. at 553, 633 P.2d at 362.

Appellant argues that Appellee filed neither an answer nor a Counterclaim for diminished rental value of the apartment.[9] Unquestionably, however, testimony regarding the cooling issue, Appellee's vacation of the premises to stay with family and friends due to the lack of adequate cooling, Appellee's purchase of an air conditioning unit and a fan, and Appellee's discomfort was received without objection. Any rights to set off or damages for interference with the beneficial enjoyment of the leasehold or breach of the implied covenant of habitability on the part of Appellee were, therefore, tried by consent and will be treated as though they had been raised in the pleadings.[10] In closing argument below, Appellant's attorney argued that damages under A.R.S. Section 33-1364(A)(2) only obtain when the landlord is either negligent or deliberate in its failure to supply reasonable amounts of air conditioning or cooling and that here the landlord acted neither negligently nor deliberately. However, the remedies available to a tenant set forth in this provision are not intended to be exclusive remedies either for non-culpable or culpable failure to provide essential services, nor does it preclude recovery for discomfort, anxiety or other mental distress.[11]

At the conclusion of the trial, the court found:

> … The Court has adjusted the rent. The Court doesn't believe that a landlord that can't keep a unit up 13 days is entitled to a concession move out. And it [ha]s also pro-rated the rent for that month. 13 days in this kind of weather is unconscionable even if the landlord made good faith effort. If that's the kind of equipment you got that takes 13 days to fix it, someone needs to

[9] Plaintiff's [Appellant's] Opening Brief at page 4, lines 7-11.
[10] *Thomas v. Goudreault*, 163 Ariz. 159, 164, 786 P.2d 1010 (App. 1989).
[11] Id. at 165.

address that…[12]

The trial court's finding that the conditions were unconscionable even if the landlord made good faith effort and its finding that rents should be adjusted for 13 days on account thereof, whether as a set off or as a determination of tenant's damages is in full accord with *Thomas v. Goudreault*[13] and is supported by substantial evidence.

Appellant's property manager, Ms. Rayes, testified that one out of two chillers were inoperative from June 19, 2001 to June 30, 2001 resulting in 85 degree temperatures in the affected apartments. Ms. Rayes further testified that both chillers were inoperative on July 3, 2001 and July 4, 2001. In fact, she testified that "on July the 9th, the chiller rental was gone, the transformer, all the leaks were repaired, everything was up and going fine."[14] She also testified that Appellee last complained of inadequate air conditioning on July 16, 2001.[15] Thus, the cooling problem may well have existed for more than the 13 days for which the trial court adjusted rent.

The failure of the landlord to supply adequate air conditioning constitutes a breach of A.R.S. Section 13-1324(A)(6) as well as a breach of the covenant of habitability implied in the lease. The landlord may not recover on the rental concession provision of the lease agreement where it has failed to fully perform under the same lease agreement.[16] The trial court's finding that a landlord that can't keep a unit up for 13 days is not entitled to a concession move out is in full accord with *Allen D. Shadron, Inc., v. Cole*,[17] and is supported by substantial evidence.

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[12] Tape of proceedings of August 27, 2001, at counter 207-212.
[13] 163 Ariz. 159, 786 P.2d 1010 (1989).
[14] Tape of proceedings of August 27, 2001 at counter 117-119.
[15] Id. at 164.
[16] *Allen D. Shadron, Inc. v. Cole*, 101 Ariz. 341, 342, 419 P.2d 520 (1966).
[17] 101 Ariz. 341, 419 P.2d 520 (1966).

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IT IS THEREFORE ORDERED affirming the judgment in favor of Appellant in the Glendale Justice Court.

IT IS FURTHER ORDERED remanding this case back to the Glendale Justice Court for all further and future proceedings.